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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/664,101	09/17/2003	Beata Bartkowska	F3315(C)	3698

201 7590 04/17/2006

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EXAMINER

PEARSE, ADEPEJU OMOLOLA

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 04/17/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/664,101	Applicant(s) BARTKOWSKA ET AL.	
	Examiner Adepeju Pearse	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 02 March 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-17 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-17 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>3/6/2006</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Response to Arguments

1. Applicant's arguments with respect to claims 1-17 have been considered but are moot in view of the new ground(s) of rejection. Applicant argues that Blake contains emulsifiers, which are excluded from the present invention. However, Blake positively recites that the frozen confection does not contain emulsifiers (col 4 lines 11-12). Applicant has not disclosed in the disclosure or positively claimed which emulsifiers are excluded from the instant invention.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

4. Claims 1-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jonas (U.S. Pat. No. 4,971,824) in view of Koss et al (WO 02/094035) and Blake (U.S. Pat. No. 4,244,981). With regard to claim 1, Jonas discloses a frozen natural product having an overrun between about 18 and 100, a pH of less than about 4.5 (abstract) comprising water (see examples 1-6), no added fat and high fiber content (col 2 lines 34-37). The frozen product contains fruit purees at varying wt% (see examples 1-6), it would be expected that these fruit purees would contain both soluble and insoluble dietary fiber at the amounts instantly claimed. The frozen product contains

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no stabilizers or non-natural additives. Jonas is silent as to the presence of emulsifiers, however, it would be obvious to one of ordinary skill in the art to expect that non-natural additives encompasses emulsifiers. Jonas failed to disclose sweeteners and milk solids not fat in the composition. Koss et al teach a nutritional frozen dessert containing sweeteners from 0.02% to 22% (page 5 lines 24-28); this range is within applicant's recited range and optionally containing emulsifiers and stabilizers (page 9, lines 11-12). The Office interprets the term "optionally" to mean that the frozen product may not contain emulsifiers and stabilizers as instantly claimed. In addition the frozen product contains dietary fibers i.e. soluble and insoluble fibers (page 22 lines 31-32, page 23 lines 1-5) and dairy based components including non-fat dry milk (page 9 lines 20-27) at a percentage of 1.8% (page 27, example 1) which is within applicant's recited range. It would be obvious to one of ordinary skill in the art to modify Jonas with the teachings of Koss et al in order to increase the nutritional benefit of the frozen natural product.

5. With regard to claims 2-3, Jonas discloses a frozen natural product with high fiber content containing fruit purees (examples 1-6, col 2 lines 34-37). It would be obvious to one of ordinary skill in the art to expect that the fruit purees contain both soluble and insoluble dietary fiber as instantly claimed.

6. With regard to claims 4-5, Jonas discloses a high fiber content frozen product utilizing fruit purees as the instantly claimed but failed to disclose the amount of the soluble and insoluble dietary fiber present in the frozen product. However, it would be obvious to one of ordinary skill in the art to expect that the amounts of the insoluble and soluble dietary would be within the claimed range because they are from the same source i.e. fruit puree.

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7. With regard to claims 6 and 12, Jonas discloses a method for preparing a frozen product having an overrun between about 18 and 100, a pH of less than about 4.5 (abstract) comprising water (see examples 1-6), no added fat and high fiber content (col 2 lines 34-37). The frozen product contains fruit purees at varying wt% (see examples 1-6), it would be expected that these fruit purees would contain both soluble and insoluble dietary fiber at the amounts instantly claimed. The frozen product contains no stabilizers or non-natural additives. Jonas is silent as to the presence of emulsifiers, however, it would be obvious to one of ordinary skill in the art to expect that non-natural additives encompasses emulsifiers. Jonas failed to disclose sweeteners and milk solids not fat in the composition. Koss et al teach a nutritional frozen dessert containing sweeteners from 0.02% to 22% (page 5 lines 24-28); this range is within applicant's recited range and optionally containing emulsifiers and stabilizers (page 9, lines 11-12), the method comprising preparing a base by mixing ingredients including about 5% purees (see example 4), juices and water, adjusting the pH of the base to less than about 4.5 (col 1 lines 39-45), aseptically processed by heating, cooled and then frozen. However, Jonas failed to disclose homogenizing or aerating the product. Koss et al teach a method of preparing a frozen dessert comprising mixing components in a tank, subjecting the mixture to pasteurization and homogenization (page 23 lines 6-7), cooling the product (page 24 line 1) and then freezing and aerating the product (page 25 lines 17-18). It would have been obvious to one of ordinary skill in the art to modify Jonas with the teachings of Koss et al by homogenizing the product and aerating to incorporate air to provide the desired amount of overrun.

8. With regard to claim 7, Jonas failed to disclose utilizing a base to adjust the pH of the fruit puree. However, bases are well known for their art recognized function in adjusting pH.

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9. With regard to claims 8 and 14, Jonas discloses preparing a frozen product containing no added fat by mixing fruit puree, water, etc but failed to disclose milk solids non-fat and sweeteners in the composition. Koss et al teaches a method of preparing a frozen dessert comprising mixing sweeteners, and nonfat dry milk (page 27, example 1). It would have been obvious to one of ordinary skill in the art to modify Jonas with the teachings of Koss et al by incorporating these ingredients in order to increase the nutritional benefit of the product.

10. With regard to claims 9-10 and 15-16, Jonas discloses a frozen product with a pH of less than about 4.5 but failed to disclose utilizing edible acid. However, Koss et al utilizes citric acid as an edible acid to adjust pH (page 11 lines 9-12). It would be obvious to one of ordinary skill in the art to modify Jonas with Koss et al by utilizing this acid for its art recognized function.

11. With regard to claims 11 and 17, Jonas failed to disclose a cooling temperature and time period before freezing the product. However, Koss et al teach cooling the pasteurized and homogenized mixture to about 40°F or less (about 4°C) for anywhere between several hours and a day (page 21 lines 1-3, see example 1). It would be obvious to one of ordinary skill in the art to modify Jonas with the teachings of Koss et al in order to have a nutritional and stable product.

12. With regard to claim 13, Jonas failed to disclose homogenizing the fruit puree before being added to the premix of the frozen product. However, it is well known to homogenize juice vesicles before being mixed with other ingredients as evidenced by Blake (col 16 lines 15-20).

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Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Adepeju Pearse whose telephone number is 571-272-8560. The examiner can normally be reached on Monday through Friday, 8.00am - 4.30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Peju Pearse
Art Unit 1761
13.



CAROLYN PADEN 1761
PRIMARY EXAMINER 4-14-06